BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WALTER J. OUBRE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,356
DILLON COMPANIES, INC.	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent appealed the July 31, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. James B. Zongker of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 24, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

ALJ Klein determined claimant sustained a left knee injury by accident on March 3, 2012, arising out of and in the course of his employment with respondent. ALJ Klein neglected to inquire of the parties what issues were in dispute. However, respondent indicated it was denying compensability because: (1) claimant's current left knee complaints were the result of an activity of daily living, not a work-related accident, and (2) claimant's accident was not the prevailing factor causing his injury and current need for medical treatment. Respondent asserted claimant merely aggravated a preexisting knee condition.

The issue before the Board is:

Did claimant sustain a left knee injury by accident on March 3, 2012, arising out of and in the course of his employment with respondent? Specifically, (1) was claimant's accident the prevailing factor causing the injury, medical condition, and current need for

medical treatment and (2) is claimant's injury the result of a normal activity of day-to-day living?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant testified that on March 3, 2012, he set a box onto a pallet and twisted to get another box. In doing so, claimant planted his left leg and felt a pop in his left knee. Claimant immediately reported the incident to his supervisor. Apparently, claimant did not return to work following the March 3, 2012, accident. He returned to work on April 29, 2012, which was approximately two weeks after Dr. Pat Do performed arthroscopic surgery on the left knee. On March 6, 2012, claimant completed an employee report of work related injury form for respondent and indicated on the form, "I was picking boxes in 6 [a]isle, I stepped to grab my next box an *[sic]* my knee popped."[1]

Claimant testified that he was initially sent by respondent to see Dr. Jerold D. Albright at Prairie Star Health Center, but he could not assist claimant. Later, claimant testified he saw Dr. Albright two or three times, but Dr. Albright was advised by respondent that the accident was not compensable. The doctor's records are not in evidence. Claimant testified he was then instructed by Georgie Jacobs in Human Resources to see Dr. Pat Do. On cross-examination, claimant admitted Ms. Jacobs merely assisted claimant in getting in to see Dr. Do, but that claimant's health insurance company helped pay Dr. Do's bill.

Dr. Do initially saw claimant on April 10, 2012. A medical history form in Dr. Do's records indicated claimant injured himself while walking at work. Dr. Do's notes from that appointment stated claimant reported he was hurt at work, but it was denied through workers compensation. Claimant admitted telling Dr. Do the left knee injury occurred while walking. Dr. Do's notes from the April 10, 2012, appointment stated that claimant denied any specific injury, but reported he may have just twisted it somehow. An April 3, 2012, MRI of claimant's knee was unremarkable. Dr. Do assessed claimant with "[l]eft knee pain – chondromalacia patella – possible medial meniscus tear not seen on MRI."[2]

On April 16, 2012, Dr. Do operated on claimant's left knee. He determined claimant had grade II chondromalacia of the medial femoral condyle, which he shaved back to a smooth and stable border. He also shaved the posterior horn of the medial meniscus back to a smooth and stable border. Along the anterior compartment of the left knee, claimant

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[1] P.H. Trans., Cl. Ex. 2.

[2] *Id.*, Resp. Ex. 1.

had a grade III chondromalacia of the patella that Dr. Do shaved back to a smooth and stable border. Following surgery, claimant underwent physical therapy and was able to return to work on April 29, 2012.

The April 18, 2012, records of physical therapist Mark R. Hall were placed into evidence by respondent. The report states claimant was walking at work when he felt a pop in the left knee and experienced sudden pain. The report states, "The patient denies any twisting mechanism."[3]

Prior to March 3, 2012, claimant had a history of left knee issues. He testified that in 1998 he strained ligaments in the left knee. Claimant also testified he fractured the left kneecap in 1999, but did not require surgery. On November 14, 2008, claimant saw Dr. Anthony Kory Jackson at Hutchinson Clinic for left knee pain. Dr. Jackson's records indicated claimant had a history of knee pain and left knee surgery in Wichita, but it was unclear what type of surgery was done. Claimant next saw Dr. Jackson for left knee pain on September 21, 2009, and was prescribed physical therapy and Ibuprofen. During an October 19, 2009, appointment with Dr. Jackson, claimant reported his knee condition had worsened. Dr. Jackson noted that an x-ray revealed some bone fragments in the left knee and referred him to Dr. Lairmore. Dr. Jackson gave claimant samples of Celebrex and recommended an over-the-counter knee brace.

Claimant was seen by Dr. Lairmore on November 3, 2009. Claimant reported that at times his knee popped and he had intermittent burning pain along the lateral aspect of the left knee. An MRI performed on November 4, 2009, was essentially normal, but did reveal chondromalacia patellae. It showed no bone fragments, fractures or meniscal tear. All tendons were intact. On November 17, 2009, claimant's left knee was injected by physician assistant Daric T. Neuschafer. Claimant received no further medical treatment for his left knee until December 16, 2010, when he received another injection from physician assistant Neuschafer. That was the last time claimant sought medical treatment for his left knee condition until after the March 3, 2012, incident. Claimant testified the shots would provide him relief for a period of time.

At the request of his attorney, on May 23, 2012, claimant was evaluated by Dr. Pedro A. Murati, a physiatrist. His report indicated claimant set a box down, planted his left foot, twisted and felt a pop. Claimant reported to Dr. Murati of having a history of left knee issues, including strained ligaments in 1998, arthroscopic surgery and a fractured left patella. Dr. Murati did not have any of claimant's medical records that preexisted the March 3, 2012, accident. Nor did he review any current radiological films or MRIs. He did review the medical records of Drs. Albright and Do. Dr. Murati's report indicated that claimant saw Dr. Albright on March 5, 13, 21 and 27, 2012. According to Dr. Murati's

[3] *Id.*, Resp. Ex. 2.

report, in a note from the March 21, 2012, appointment, Dr. Albright indicated this was a new left knee injury unrelated to any prior problems.

Dr. Murati's impressions were: (1) status post left knee arthroscopy with chondroplasty of patella and medial femoral condyle; (2) left patellofemoral syndrome and (3) probable deep vein thrombosis in the left lower extremity.

In his report, Dr. Murati stated the following concerning causation of claimant's left knee injury:

> The claimant sustained an injury at work which resulted in left knee pain. The claimant is a young person. His smoking habit although deleterious as *[sic]* not known as a direct cause of any of his diagnoses. His hobbies are not known as a direct cause of any of his diagnoses. He does have significant pre-existing injuries to his left knee that may be related to his medical conditions. However, the claimant appeared to be asymptomatic prior to this accident on 3/3/12 while employed at Dillons Warehouse. I do not have these preexisting records available for my review. Therefore under all reasonable medical certainty the prevailing factor in the development of the above named impressions is the accident at Dillons warehouse. Please send me all pre-existing records regarding the left knee since some of my opinions could change after review of such documentation.[4]

There is nothing in the record indicating that Dr. Murati received claimant's medical records that preexisted the March 3, 2012, accident, or that Dr. Murati changed his opinion.

ALJ Klein found in favor of claimant and stated in his preliminary Order,

> The court finds that the claimant met with personal injury by accident arising out of and in the course of his employment on March 3, 2012. The court further finds that this injury is the prevailing factor in the claimant's need for treatment. The claimant's testimony, and description of his injury to his therapist involved a twisting motion, not mere walking.[5]

ALJ Klein ordered respondent to pay temporary total disability benefits from March 4, 2012, through April 28, 2012, and ordered respondent to designate a treating physician for claimant.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[4] *Id.*, Cl. Ex. 1.

[5] ALJ Order (July 31, 2012).

right depends.[6] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[7]

K.S.A. 2011 Supp. 44-508 states in pertinent part,

> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> . . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The first issue that must be resolved is whether claimant sustained his burden of proving that the March 3, 2012, accident was the prevailing factor causing his injury, medical condition, and current need for medical treatment. Claimant testified he has had a history of preexisitng left knee issues since 1998, including arthroscopic surgery and a

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[6] K.S.A. 2011 Supp. 44-501b(c).

[7] K.S.A. 2011 Supp. 44-508(h).

left knee fracture. From November 2008 through December 2010, claimant received medical treatment for the left knee.

The evidence concerning how claimant was injured is convoluted. There were differing versions given of how claimant sustained his injury. Claimant testified he was injured when he twisted his knee while turning to pick up a box. Dr. Do's records indicated claimant denied a specific injury, but might have twisted his left knee. Claimant admitted completing an intake sheet for Dr. Do, and listing walking as the mechanism of injury. The ALJ indicated claimant reported to physical therapist Mark R. Hall of injuring the left knee while twisting. However, that is erroneous as Mr. Hall's report states claimant reported injuring the knee while walking at work, and denied a twisting mechanism. This casts doubt on claimant's credibility.

Dr. Murati opined claimant's March 3, 2012, accident while working for respondent was the prevailing factor causing claimant's left knee condition. When he rendered that opinion, Dr. Murati had none of claimant's medical records that preexisted the accident. He stated his opinion could change after receiving claimant's preexisting medical records. Dr. Murati's report does not indicate he was aware of claimant receiving treatment for the left knee condition in 2008 through 2010. He appears to rely on Dr. Albright's report that prior to claimant's March 3, 2012, accident, he had no problems since having arthroscopic surgery 12 to 13 years earlier. This Board Member gives little weight to Dr. Murati's opinion, as he had an incomplete picture of claimant's left knee condition prior to March 3, 2012.

Claimant's November 4, 2009, MRI revealed chondromalacia patellae. After reviewing claimant's April 3, 2012, MRI, Dr. Do assessed claimant as having chondromalacia patella. During the April 16, 2012, surgery performed by Dr. Do, the doctor determined claimant had: (1) grade II chondromalacia of the medial femoral condyle, which he shaved back to a smooth and stable border and (2) grade III chondromalacia of the patella that he shaved back to a smooth and stable border. From the medical evidence in the record, it is apparent claimant had chondromalacia patellae that was symptomatic from 2008 through 2010, and then was asymptomatic until the March 3, 2012, accident. However, claimant's underlying condition of chondromalacia patellae did not change. The March 3, 2012, accident made claimant's preexisting chondromalacia patellae symptomatic. K.S.A. 2011 Supp. 44-508(f)(2) provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

This Board Member finds claimant failed to prove the March 3, 2012, accident was the prevailing factor causing his injury and current need for medical care. Claimant had left knee chondromalacia patellae that preexisted his accident. The March 3, 2012, accident caused the chondromalacia patellae to again become symptomatic. Simply put, claimant failed to prove by a preponderance of the evidence that on March 3, 2012, he

sustained a personal injury by accident arising out of and in the course of his employment with respondent.

It is unnecessary to address respondent's contention that claimant's left knee injury was the result of a normal activity of day-to-day living.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

CONCLUSION

Claimant failed to prove by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

WHEREFORE, the undersigned Board Member reverses the July 31, 2012, Order entered by ALJ Klein.

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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Thomas Klein, Administrative Law Judge

[8] K.S.A. 2011 Supp. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).